Supreme Court, U.S.
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No. 95-875

In the Supreme Court of the United States

OCTOBER TERM, 1995

GOOL COUNTS, PETITIONER

v.

JESSE BROWN, SECRETARY OF VETERANS AFFAIRS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

DREW S. DAYS, III
Solicitor General
FRANK W. HUNGER
Assistant Attorney General
DAVID M. COHEN
SHARON Y. EUBANKS
WILLIAM P. DONOVAN, JR.
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

14pp

QUESTION PRESENTED

Whether the court of appeals correctly concluded that it lacked jurisdiction to hear an appeal from the Court of Veterans Appeals where the appellant failed to raise a substantial constitutional claim or an issue as to the interpretation of a statute or regulation.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-4) is unpublished, but the decision is noted at 66 F.3d 345 (Table). The opinion of the Court of Veterans Appeals (Pet. App. 5-42) is reported at 6 Vet. App. 473.

JURISDICTION

The judgment of the court of appeals was entered on September 1, 1995. The petition for a writ of certiorari was filed on November 30, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner served on active duty in the United States Army from July 28, 1943, to December 14, 1945.

Pet. App. 1. His induction physical examination revealed no significant physical defects. Gov't C.A. App. 29-32.

Medical records indicate that, on April 25, 1944, petitioner was hospitalized in England for injuries sustained when a truck in which he was a passenger overturned. Gov't C.A. App. 35-48. During a physical examination conducted on April 26, 1944, doctors found no defects in petitioner's bones, joints, or muscles. *Id.* at 44-45. A progress note, dated April 28, 1944, states that lacerations of petitioner's lip and left leg healed cleanly. *Id.* at 43. An undated "Final Summary" further notes that petitioner's other wounds had healed cleanly and that he was ready to return to duty. *Id.* at 42. On May 3, 1944, petitioner was discharged from the hospital. Pet. 3.

On November 30, 1945, petitioner underwent a physical examination prior to his release from active duty. Gov't C.A. App. 59. Among other findings, the examiner noted that petitioner had been hospitalized for nine days following the truck accident, but that he "had no subsequent treatment." *Id.* at 60. An entry on the separation examination form, which appears to be the opinion of an orthopedic consultant, reflects an "impression" of "[c]hronic strain left shoulder" and "possible traumatic arthritis of dorsal spine," and recommends x-rays of the left shoulder and dorsal spine. *Id.* at 61. The next notation on the form states that "X-rays of left shoulder and spine [were] essentially negative" and that no orthopedic treatment was required. *Ibid.*

2. Shortly after his separation from the armed forces, petitioner filed a claim with the Veterans' Administration (VA) for service-connected disability

compensation for injuries allegedly related to the truck accident. Pet. 5.

In a decision dated April 10, 1946, a VA regional office denied a back-injury claim by petitioner on the ground that the injury had not been found during petitioner's pre-release examination, and deferred a decision on another claim, for herniorrhaphy residuals, pending receipt of additional records. Gov't C.A. App. 68. On May 4, 1946, the VA regional office awarded service connection and a ten percent disability rating for a "tender hernia scar." Pet. 5. The notice states that the decision was "based on incomplete records. Upon receipt of additional records your case will be reviewed and you will be notified of the action taken." Gov't C.A. App. 67. Benefits of $11.50 per month were awarded for the hernia scar. *Id.* at 66.

On July 23, 1947, the regional office issued a decision confirming both the ten percent rating for the hernia scar and the denial of service connection for the back injury. Gov't C.A. App. 121. In a letter to petitioner dated August 1, 1947, the regional office stated: "Your compensation claim was reviewed under Public Act 458, 79th Congress, which authorized a new rating schedule for evaluating disabilities in connection with additional service records." *Id.* at 122. The letter further stated that "[a] decision was rendered that no change was warranted in the status of your claim." *Ibid.*

3. The VA thereafter conducted physical examinations of petitioner in 1948, 1951 and 1960. Gov't C.A. App. 123-133. In 1951, the VA determined that petitioner's hernia scar, although connected to service, was no longer disabling. The VA further determined that a scar on petitioner's left knee was

service-connected but not disabling. Thus, petitioner was deemed ineligible for compensation. *Id.* at 69.

In January, 1960, the VA regional office denied petitioner's claims concerning certain "residuals" of injuries related to the truck accident. Gov't C.A. App. 130-132. Petitioner appealed that decision to the Board of Veterans' Appeals (Board). In September, 1960, the Board denied his claims. The regional office and the Board denied the same claims again in 1961 and 1962, after petitioner submitted additional evidence. *Id.* at 135; Gov't C.A. Br. 8.

Between 1962 and 1987, petitioner submitted numerous affidavits and statements from private physicians regarding his asserted disabilities and presented testimony at personal hearings at the VA regional office. His claims of service connection for residuals of various injuries were denied by Board decisions in 1963, 1965, 1967, 1980, 1982, 1984 and 1987. Gov't C.A. App. 134-144.

4. In July, 1988, petitioner submitted copies of several newspaper articles to the regional office. Gov't C.A. App. 115-120. One of those articles pertains to fines assessed against the VA in litigation unrelated to the present proceedings. *Id.* at 115. The remainder pertain to an incident during World War II in which 749 American soldiers were killed during training exercises in April, 1944, prior to the invasion of Normandy. *Id.* at 116-120.

In October, 1988, the regional office received copies of two extracts maintained by the Department of the Army, Office of the Surgeon General, bearing petitioner's service number, but not containing any names or other identifying information. One of the extracts states that a service member was hospitalized in May, 1944, in the South Pacific for chronic

cystitis and stricture of the urethra. Pet. 6. The other extract indicates that a service member was hospitalized in April, 1944, for injuries resulting from a truck accident. *Ibid.*

Petitioner asserted that the newspaper clippings and Surgeon General's Office extracts constituted "new and material evidence" requiring reconsideration of his benefit claims. Gov't C.A. App. 156-158. In May, 1989, the regional office again declined to reopen the claims. See *id.* at 146. Petitioner, who was represented by counsel, appealed that decision to the Board and was given the opportunity to testify before the Board. *Id.* at 134, 146, 153-156. In a decision dated April 15, 1991, the Board determined that the newspaper clippings, the Surgeon General's Office extracts, and petitioner's testimony did not constitute new and material evidence. *Id.* at 156-160. The Board found, in pertinent part, that petitioner's testimony and the extract regarding petitioner's hospitalization following the truck accident were duplicative of evidence previously presented to the Board. *Id.* at 158-159. The Board also concluded that the news clippings and the additional extract concerning the service member hospitalized in the South Pacific were not material. *Ibid.*

5. Petitioner appealed to the Court of Veterans Appeals (CVA). In its May 27, 1994, decision, the CVA held that petitioner had not submitted new and material evidence and that the VA did not breach a duty to assist petitioner. Pet. App. 6-26. On September 9, 1994, the CVA denied petitioner's motion for review *en banc* and entered judgment. See Pet. 6.

Petitioner then filed an appeal with the United States Court of Appeals for the Federal Circuit. The court of appeals dismissed the appeal for lack of juris-

diction. Pet. App. 1-4. The court noted that it had jurisdiction to review only "challenges to the validity or interpretation of a statute or regulation, or to the interpretation of a constitution provision, that the Court of Veteran's Appeals relied on in its decision." *Id.* at 2. Petitioner, however, "challenge[d] only factual determinations or the application of law to the facts of his case and [did] not present a genuine constitutional issue or a challenge to the validity or interpretation of a statute or regulation." *Id.* at 3.[1]

ARGUMENT

The court of appeals correctly determined that it did not have jurisdiction to hear this appeal under 38 U.S.C. 7292(c) and (d)(2) (Supp. V 1993) because petitioner did not present a substantial constitutional question or a question as to the validity or interpretation of a statute or regulation. Pet. App. 3-4.

1. Federal courts of appeals are courts of limited jurisdiction. *E.g.*, *Aldinger* v. *Howard*, 427 U.S. 1, 15 (1976). For any inferior court to exercise jurisdiction, that jurisdiction must have been conferred by an Act of Congress. *Finley* v. *United States*, 490 U.S. 545, 548 (1989). Inferior courts may not, even in the interest of justice, extend their jurisdiction where none exists. *Christianson* v. *Colt Indus. Operating Corp.*, 486 U.S. 800, 818 (1988). The law is also clear that an appellant or petitioner has the burden of establishing the jurisdiction of a court of appeals. *Kokkonen* v. *Guardian Life Ins. Co.*, 114 S. Ct. 1673, 1675 (1994).

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[1] Contrary to petitioner's assertion, the government did not concede at oral argument that any service records relating to petitioner are missing.

The Veterans' Judicial Review Act, Pub. L. No. 100-687, Div. A, 102 Stat. 4105, established the CVA and specified the limited circumstances in which the Court of Appeals for the Federal Circuit has jurisdiction to consider appeals from CVA decisions. Pursuant to 38 U.S.C. 7292(c) (Supp. V 1993), the court of appeals has exclusive jurisdiction "to review and decide any challenge to the validity of any statute or regulation or any interpretation thereof brought under this section, and to interpret constitutional and statutory provisions, to the extent presented and necessary to a decision." Except to the extent that an appeal presents a constitutional issue, however, the court of appeals "may not review (A) a challenge to a factual determination, or (B) a challenge to a law or regulation as applied to the facts of a particular case." 38 U.S.C. 7292(d)(2) (Supp. V 1993). Petitioner does not challenge the validity of a statute or regulation and he does not present a constitutional issue. The court of appeals therefore correctly dismissed petitioner's appeal for lack of jurisdiction.

2. This case does not raise a question as to the validity or interpretation of a statute or regulation. The CVA found that the newpaper articles and two extracts provided by the Office of the Surgeon General did not constitute "new and material evidence" requiring the VA to reopen petitioner's claims. See 38 U.S.C. 3008, 4004(b); 38 C.F.R. 19.194 (1987); *Cox* v. *Brown*, 5 Vet. App. 95, 98 (1993). Petitioner does not challenge the CVA's interpretation of the "new and material" standard; rather, petitioner argues that the CVA should have found that he had met that standard. Pet. 21. Petitioner's claim thus challenges "a law or regulation as applied to the facts

of a particular case." Review of such an issue is precluded under Section 7292(d)(2).

3. Petitioner argues that Section 7292(d)(2) violates separation of powers because it allows courts to shirk their duty to review judgments merely by holding that the judgments were based on factual findings or the application of law to facts. Pet. 19-21. That argument was not raised before any of the courts below and is not properly before this Court. Moreover, the argument is meritless.

"As a court of review, not one of first view," *Oklahoma Tax Comm'n* v. *Chickasaw Nation*, 115 S. Ct. 2214, 2219 (1995), this Court "usually will decline to consider questions presented in a petition for certiorari that have not been considered by the lower court." *Patrick* v. *Burget*, 486 U.S. 94, 99 n.5 (1988); see also *INS* v. *National Center For Immigrants' Rights*, 502 U.S. 183, 188 (1991); *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976). This Court will address a ground not raised below "only in exceptional cases." *Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33, 39 (1989). Petitioner was represented by counsel before the court of appeals and the CVA, and has offered no explanation for his failure to raise the separation of powers claim at an earlier stage of the litigation; nor has petitioner identified any relevant extraordinary circumstances.

In any event, petitioner's claim that Section 7292(d)(2) violates separation of powers principles is meritless. The statute's provisions are clear and do not leave courts with undue discretion to refuse to exercise jurisdiction. Read in conjunction with Section 7292(c), Section 7292(d)(2) requires the court of appeals to dismiss an appeal from the CVA if the appeal "does not raise a constitutional question, a

question as to the interpretation of a constitutional or statutory provision, or the interpretation or validity of a regulation relied upon by the Court of Veteran's Appeals." *Albun* v. *Brown*, 9 F.3d 1528, 1530 (Fed. Cir. 1993). Provisions confining appellate jurisdiction to questions of law are familiar and do not raise any constitutional issues in the government benefits context.

4. The court of appeals correctly determined that this case does not raise a substantial due process issue.[2] Petitioner appears to argue that, because he is an applicant who has been denied benefits, due process requires that his claims be reopened because he alleges that "records are missing."

In support of this argument, petitioner relies on language in a notification dated May 4, 1946, which stated that records were "incomplete" at that time and that petitioner's claim would be reconsidered "upon receipt of additional records." Pet. 5. On August 1, 1947, however, petitioner received notification that his claim had, in fact, been reconsidered in light of additional records. Gov't C.A. App. 122. No evidence supports petitioner's contention that records are still missing; indeed, existing documentation of petitioner's condition is quite extensive. The VA's decisions were based on records concerning (a) petitioner's hospitalization in 1944; (b) his medical

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[2] The petition asserts that this case presents the question whether "a veteran [has] a property interest protected by the Due Process Clause of the Fifth Amendment in receiving disability benefits." Pet. i, 25. This Court has already decided that veterans have a property interest in the continued receipt of disability benefits that is protected by the Due Process Clause. See *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 320 n.8 (1985).

examination in 1945; (c) documents received by the VA in 1946; (d) subsequent medical examinations in 1948, 1951 and 1960; and (e) other documents introduced in the many VA proceedings petitioner has initiated since the 1940's. See, *e.g.*, *id.* at 35-48, 59-63, 69-70, 121, 123-133.

Petitioner first applied for benefits in 1945 and has repeatedly been given the opportunity to submit affidavits and new evidence, to testify in support of his claims, and to appeal the denial of benefits to the Board and to the CVA. Petitioner was given physical examinations in at least 1944, 1945, 1948, 1951 and 1960. Gov't C.A. App. 52-61, 123-133. Additionally, prior to petitioner's initiation of the current proceedings in 1988, decisions were rendered on these same claims in 1946, 1947, 1951, 1960, 1963, 1965, 1967, 1980, 1982, 1984 and 1987. See *id.* at 68-70, 121-122, 134-136, 138, 141, 143, 159. In view of this extensive consideration, petitioner has no substantial claim that due process has been violated.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General
FRANK W. HUNGER
Assistant Attorney General
DAVID M. COHEN
SHARON Y. EUBANKS
WILLIAM P. DONOVAN, JR.
Attorneys

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